87-791

NO.

in the Supreme Court of the United States

RICHARD ELORTEGUI and
JORGE MANOAH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Bruce S. Rogow
2097 Southwest 27th Terrace
Ft. Lauderdale, Florida 33312
(305) 524-2465
Counsel for Petitioners

22pp

QUESTION PRESENTED FOR REVIEW

WHERE DEFENDANTS WHO MAINTAIN THEIR INNOCENCE HAVE UNDERGONE POLYGRAPH EXAMINATIONS AND ASK ONLY THAT THE COURT CONDUCT A HEARING TO DETERMINE THE RELIABILITY AND ADMISSIBILITY OF POLYGRAPHS, DOES RULE 702 OF THE FEDERAL RULES OF EVIDENCE PROVIDE THE MECHANISM FOR THAT HEARING, AND CAN THE DEFENDANTS BE DENIED SUCH AN OPPORTUNITY TO BE HEARD BY A *PER SE* RULE OF THE COURT OF APPEALS PRECLUDING ANY USE OF POLYGRAPH TESTIMONY?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—(Continued)

NO.

in the

Supreme Court

of the

United States

RICHARD ELORTEGUI and
JORGE MANOAH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINION BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished. It is reprinted in the Appendix to this Petition.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on August 5, 1987. A timely Petition for Rehearing was denied on September 16, 1987. This Petition for Writ of Certiorari has been filed within 60 days of the order denying rehearing. *See,* Rule 20.1 and .4 of the Rules of this Court.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

RULE OF EVIDENCE INVOLVED

Rule 702 Testimony by Experts

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

The Petitioners, Richard Elortegui and Jorge Manoah, were convicted of conspiracy to possess and possession of cocaine with intent to distribute. Each was sentenced to twenty years imprisonment.

Both Elortegui and Manoah have consistently maintained their innocence. Thus both, with permission of their counsel, voluntarily presented themselves to the FBI for post-arrest, pre-trial unlimited interviews. Both submitted themselves and their witnesses to polygraph tests conducted by licensed Florida polygraph examiners. Elortegui testified at the trial. It was not enough. Both were convicted.

The government's case hinged primarily on the testimony of Carlos Gonzalez, a Yellow Cab manager who said he had spoken to Elortegui and Manoah and arranged a cocaine delivery at the Yellow Cab Company in Miami. Two other men on the Yellow Cab lot confirmed Elortegui and Manoah's presence and some of their activity at the lot on the afternoon of the delivery. Government surveillance placed Elortegui and Manoah at the lot at that time.

Elortegui and Manoah never denied their presence at the Yellow Cab lot, nor did they deny they knew and spoke to Gonzalez. Their visit and discussions involved not a cocaine conspiracy, but application of Yellow Cab's concepts of self-insurance to Elortegui's trucking companies.

We do not develop the facts in detail because the Petitioners concede as they did in the Court below that the evidence, viewed in the light most favorable to the government, supported the jury verdicts. However the Petitioners were not allowed to develop the possible admissibility of the polygraph evidence which might have dictated a different outcome. The trial court rejected the Petitioners' request to hold a hearing under

Federal Evidence Rule 702 to determine whether the favorable results of Petitioners' polygraph examinations could be introduced by them.[1] On appeal, the Court of Appeals agreed that no such hearing was necessary "because the results of polygraph examinations are inadmissible in this circuit." App. 2. This Petition seeks review of that ruling, in which the Court of Appeals wrote:

> Appellants question the trial court's refusal to convene an evidentiary hearing to consider the admissibility of the results of polygraph examinations they wished to introduce into evidence. Relying on Eleventh Circuit precedent, the court found an evidentiary hearing unnecessary because the results of polygraph examinations are inadmissible in this circuit. *See United States v. Clark*, 622 F.2d 917 (5th Cir. 1980) (per curiam) (en banc),

---

[1]The Government's Brief in the Eleventh Circuit nicely summarizes the situation:

> At a status hearing, the trial court stated that it was not inclined to grant an evidentiary hearing "in view of the current Eleventh Circuit decision" (R7:7). Following that status conference, appellants filed a lengthy Offer of Proof relating to the motion to admit polygraph testimony (R3:107). At trial, after further argument on the issue, the district court made the following ruling:

reinstating 598 F.2d 994 (5th Cir. 1979) (per curiam), *cert. denied,* 469 U.S. 981, 105 S.Ct. 383 (1984). *See also, United States v. Beck,* 729 F.2d 1329 (11th Cir.) (per curiam), *cert. denied,*

(Footnote 1 continued)

> THE COURT: Notwithstanding the Government's refusal to stipulate, the Court will not order a polygraph examination. As I repeated previously in this proceeding, the Eleventh Circuit, no later than December of last year, concluded that it was inappropriate to admit results of a polygraph examination.
>
> I see no reason to go beyond that controlling precedent and decision of the Eleventh Circuit. That request will be denied. Your record has been preserved several times regarding the polygraph examination.

(R10:46).

* * *

> THE COURT: Mr. Bailey, now you have a ruling that you can appeal . . .
>
> I said you have supplemented it with your written motions and the exhibits that you have attached to your motion. But you wish to call live witnesses, and that request is denied. You have made your proffer.

* * *

> The motion to allow a polygraph testimony at trial, which has now been renewed, is denied, and the request for a further evidentiary hearing is denied.

(R10:57).

465 U.S. 981, 105 S.Ct. 383 (1984). We agree that an evidentiary hearing on this issue was unnecessary. The court had before it appellants' entire evidentiary proffer and their legal arguments, a plainly adequate basis on which to make the challenged ruling.

App. 2.

REASON FOR GRANTING CERTIORARI

THE DECISION BELOW PRESENTS AN IMPORTANT BUT UNANSWERED QUESTION REGARDING THE ADMINISTRATION OF CRIMINAL JUSTICE PURSUANT TO RULE 702 OF THE FEDERAL RULES OF EVIDENCE AND CONFLICTS WITH OTHER CIRCUITS' FLEXIBLE APPLICATION OF RULE 702.

The Court of Appeals for the Eleventh Circuit has adopted a *per se* rule that the results of polygraph examinations are inadmissible as evidence. That rule emanates from *Frye v. United States,* 293 F.1013, 1014, (D.C.Cir. 1923) in which the Court refused to admit a systolic blood pressure deception test, saying it

> . . . has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced

> from the discovery, development and experiments thus far made.

Sixty-four years later *Frye's* concerns have been muted. Rapp, *The Comparative Reliability of Polygraph Evidence,* 4 Review of Litigation 151 (1985); Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence,* 29 Utah Law Review 29 (1986); Note, *The Frye Doctrine and Relevancy Approach Controversy: An Empirical Evaluation,* 74 Georgetown Law Journal 1769 (1986).

Although *Frye's* concerns have not been silenced, an opportunity to develop a supportive factual record has been presented in even the hostile cases. *Brown v. Darcy,* 783 F.2d 1389 (9th Cir. 1986). The admissibility of scientific evidence is an evolutionary process. In *United States v. Wainwright,* 413 F.2d 796, 803 (10th Cir. 1969), a polygraph case, the Court wrote: "Without doubt, matters of factual proof must keep pace with developing factual standards." Wainwright lost because he failed to supply the necessary proof. But in the former Fifth Circuit eleven judges joined Judge Gee's willingness to reconsider polygraph admissibility upon a proper record:

> I concur in the court's order because no proffer was made of evidence tending to show advances in the state of polygraph art since the seminal opinion in *Frye v. United States,* 293 F.1013 (D.C.Cir. 1923), upon which our authorities are based, or the competence of polygraphic operators. Had one been made in my view these

> authorities would properly be subject to reconsideration.
>
> *United States v. Clark,* 622 F.2d 917 (5th Cir. 1980) (en banc) (Gee, concurring), reinstating 598 F.2d 994 (5th Cir. 1979).

A proper and extensive proffer was made in this case. Indeed, the Petitioners even sought a stipulated court ordered test. *See* footnote 1, *supra.* The Eleventh Circuit's immutable rule prevented the Petitioners from laying the predicate for any consideration of their polygraphs.

This Court recently invalidated Arkansas' *per se* rule excluding a defendant's hypnotically refreshed testimony. *Rock v. Arkansas,* ____ U.S. ____, 107 S.Ct. 2704 (1987). The Court noted "The [Arkansas] rule leaves a trial judge no discretion to admit this testimony, even if the judge is persuaded of its reliability by testimony at a pre-trial hearing." *Id.,* 107 S.Ct. at 2712, n. 12. The Court concluded:

> The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified. But it has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating testimony that it should disable a defendant from presenting

her version of the events for which she is on trial.

Id., 107 S.Ct. at 2714.

The Eleventh Circuit's *per se* rule precluding polygraph admissibility disabled these Petitioners from presenting evidence which would have supported their defense. Rule 702 of the Federal Rules of Evidence provides the mechanism for conducting an evidentiary hearing to consider the present trustworthiness of polygraphs. *See, United States v. Downing,* 753 F.2d 1224, 1237 (3rd Cir. 1985):

> In our view, Rule 702 requires that a district court ruling upon the admission of (novel) scientific evidence, i.e., evidence whose scientific fundaments are not suitable candidates for judicial notice, conduct a preliminary inquiry focusing on (1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse or mislead the jury, and (3) the proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case. (footnote omitted)

Downing dealt with expert testimony regarding human perception and memory and its effect upon the reliability of eyewitness identifications. The Court reversed the district court refusal to admit the testimony and remanded for a Rule 702 inquiry.

It is ironic that eyewitness testimony, which has been called "the least reliable form of evidence" *Jackson v. Fogg,* 589 F.2d 108, 112 (2nd Cir. 1978), *Watkins v. Sowders,* 449 U.S. 340, 350-51 (1981) (Brennan, J., dissenting) is readily accepted to convict, but here polygraph testimony was denied a chance to prove its usefulness to a defendant seeking to protect his liberty.

This is an unusual case. Innocence is not irrelevant, and these Petitioners sought only a chance to present testimony which might have convinced a jury that they were innocent. Rule 702 provided the mechanism for the hearing they sought. The *per se* rule adopted by the Eleventh Circuit without the benefit of an evidentiary record is out of step with other Circuits and inconsistent with this Court's recent call for flexibility regarding use of novel scientific testimony.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BRUCE S. ROGOW
2097 Southwest 27th Terrace
Ft. Lauderdale, Florida 33312
(305) 524-2465

Counsel for Petitioners

November, 1987

Appendix

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5711
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JORGE ENRIQUE MANDAH,
(Indicted—Jorge Enrique Manoah)
RICHARD ELORTEGUI, a/k/a
Richard Elortegy,
Defendants-Appellants.

**Appeal from the United States District Court
for the Southern District of Florida**

(August 5, 1987)

Before TJOFLAT, HATCHETT and CLARK, Circuit Judges.

PER CURIAM:

Appellants and three others were indicted, in two counts, for conspiracy to possess cocaine with intent to distribute and for the substantive possession offense. The three codefendants pled guilty to the conspiracy offense; appellants went to trial and were convicted on both counts.

There is no issue in this appeal as to the sufficiency of the evidence, viewed in the light most favorable to the Government, to support the jury's verdicts. The appellants supplied the cocaine to their codefendants who had made arrangements to sell it to an undercover FBI agent. What appellants seek is a new trial, citing several allegedly prejudicial trial court rulings. None have merit, and we accordingly affirm.

Appellants challenge numerous trial court evidentiary rulings relating to defense cross-examination of prosecution witnesses, the direct examination of defense witnesses, and documentary evidence. Appellants contend, alternatively, that each of these challenges warrants a new trial; if not, the challenges do so when considered cumulatively. That is, taken as a whole, the alleged errors denied appellants a fair trial.

We review a trial court's evidentary rulings under an abuse of discretion standard. We find no violation of that standard in any of the challenged rulings, and we find no denial of a fair trial.

Appellants question the trial court's refusal to convene an evidentiary hearing to consider the admissibility of the results of polygraph examinations they wished to introduce into evidence. Relying on Eleventh Circuit precedent, the court found an evidentiary hearing unnecessary because the results of polygraph examinations are inadmissible in this circuit. *See United States v. Clark*, 622 F.2d 917 (5th Cir. 1980) (per curiam) (en banc), *reinstating* 598 F.2d 994 (5th Cir. 1979) (per curiam), *cert. denied*, 449 U.S. 1128, 101 S.Ct. 949 (1981). *See also United States v. Beck*, 729 F.2d 1329 (11th Cir.) (per curiam), *cert. denied*, 469 U.S. 981, 105 S.Ct. 383 (1984). We agree that an evidentiary hearing on this issue was unnecessary. The court had before it appellants' entire evidentiary proffer and their legal arguments, a plainly adequate basis on which to make the challenged ruling.

Appellant Elortegui contends that the court deprived him of an important witness—appellant Manoah—when it refused to grant appellants separate trials. In seeking a severance, Elortegui had to demonstrate a bona fide need for Manoah's testimony, the substance of that testimony, the exculpatory effect thereof, *and* that Manoah would have testified if called to the stand at a separate trial. *See United States v. Bollinger*, 796 F.2d 1394, 1402 (11th Cir. 1986) (citation omitted). Whether a defendant satisfies this burden is a decision committed to the trial court's discretion. We find no abuse of discretion here. The proposed testimony's exculpatory effect was doubtful; the proposed testimony lacked specificity and concrete exonerative facts; and Manoah's claim that he would testify lacked credibility.

Appellants fault the trial court's final charge to the jury in several respects, claiming error in the court's failure to give certain instructions and in the instructions it actually gave to the jury. Their claims of error have no merit and warrant no discussion.

We find that none of appellants' assignments of error calls for the granting of a new trial. Their convictions are accordingly

AFFIRMED.

[FILED Sep 16 1987]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5711

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JORGE ENRIQUE MANDAH,
(Indicted—Jorge Enrique Manoah)
RICHARD ELORTEGUI, a/k/a
Richard Elortegy,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING
(September 16, 1987)

BEFORE: TJOFLAT, HATCHETT and CLARK, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellants is Denied.

ENTERED FOR THE COURT:

/s/ Gerald [illegible] Tjoflat
United States Circuit Judge

ORD-41